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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6318

WILLIE SUMPTER,

Petitioner,

against

THE WHITE PLAINS HOUSING AUTHORITY, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION

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BRIEF OF RESPONDENT ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION

Opinions Below

The opinion of the New York Court of Appeals is reported at 29 N.Y. 2d 420, and appears in petitioner's appendix at A. 5-9.* The opinion of the Appellate Division, Second Judicial Department, is reported at 36 App. Div. 2d 728, 320 N.Y. Supp. 2d 472 (A. 10). The opinion of the Supreme Court of the State of New York is reported at 63 Misc. 2d 654, 313 N.Y.S. 2d 133 (A. 11-13).

* References to the Appendix will be prefaced by A.

Jurisdiction

The judgment of the New York Court of Appeals was entered on January 13, 1972. The petition for writ of certiorari was filed on March 10, 1972.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Does due process of law in the context of an applicant rejected for public housing, require more than specific notice of the grounds for rejection and an opportunity to rebut the evidence with the aid of counsel?

Statement of the Case

Petitioner's application for public housing was rejected by respondent White Plains Housing Authority because of his criminal record and his failure to submit certain required documents. Petitioner had an interview with a Housing Project Manager on June 30, 1969, regarding his application, and, during this interview, the Housing Project Manager informed the applicant that his criminal record would be grounds for his ineligibility. He was also informed that he had failed to produce proof of divorce from his first wife, Ruth G. Sumpter, and failed to produce the birth certificate of his third son. The Housing Project Manager told him that there would be a meeting of the Tenants' Selection Committee* on September 25, 1969, and that whatever additional information he could furnish this Committee would be considered.

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* This Committee is composed of two members of the Housing Authority, the Executive Director of the Authority, and the Tenant Relations Assistant.

On September 25, 1969, the Tenants' Selection Committee reviewed the application and made findings of fact based upon the documentation before it, including the criminal record of petitioner, and his failure to supply the information regarding his divorce from his first wife, and failure to supply the birth certificate of his third son. The Committee filed these findings in its office as required by § 156-a of the New York Public Housing Law.

On September 26, 1969, the Authority sent out its formal notice of rejection based upon the personal interview of the applicant and the findings of fact of the Tenants' Selection Committee. In a petition verified on January 23, 1970, Willie Sumpter brought an application under Article 78 of the New York Civil Practice Law and Rules.

New York Supreme Court, Westchester County, assumed, without discussion, that due process standards as to the eligibility of applicants for public housing must be the same as for tenants already living in such housing (A-12). It entered an order requiring the Housing Authority to hold a full evidentiary hearing with "verbatim minutes". In addition, it was ordered that the transcript of the minutes be submitted to the Court for further review and decision after such hearing.

This decision was unanimously reversed by New York Supreme Court, Appellate Division, Second Department, which held:

> "In our view, the administrative complications and burdens attendant upon the various housing authorities in the State preclude the rigid requirements ordered by Special Term for a 'full evidentiary hearing' in each case of rejection. Upon the oral argument of this proceeding the attorney for the *amicus curiae* New York City Housing Authority [the operations of which will be directly affected by that ruling] pointed out that at least 9,411 applications for

public housing in New York City were rejected during 1970. Nothing contained in *Matter of Williams v. White Plains Housing Authority* (62 Misc. 2d 613, aff'd 35 A.D. 2d 965) requires a contrary holding, since that case involved the eviction of a tenant already in public housing." (A-10) *Matter of Sumpter v. White Plains Housing Authority*, 36 App. Div. 2d 728, 320 N.Y.S. 2d 472 (2d Dept. 1971).

The petition was granted only to the extent that the matter was remitted to respondent Housing Authority for action consistent with § 156-a of the New York Public Housing Law.

On January 13, 1972, the Court of Appeals unanimously affirmed the decision below (A. 1-4). The Court pointed out that § 156-a of the New York Public Housing Law requires that an applicant be advised that he may be apprised of the reasons for his ineligibility at a personal interview.*

It was held that the issue on appeal was whether the petitioner was entitled to "a full evidentiary hearing" (A-6). The Court quoted from an earlier decision in *Matter of Fuller v. Urstadt*, 28 N.Y. 2d 315, 318-319, involving a tenant's right to renew a lease in a Mitchel-Lama project:

> "'Petitioners are entitled to the same treatment as other individuals who are the direct subjects of State action, namely, the assurance, implemented by the right to a hearing which need consist of no more than an opportunity to deny or explain, that the State has not acted arbitrarily or capriciously. The test is the limited one of arbitrariness and does not involve a full evidentiary hearing or the full scope review of ad-

* The Court noted that the Appellate Division had granted the petition to the extent of remitting the matter to the Housing Authority for action consistent with the notice provision in § 156-a.

ministrative quasi-judicial action which must be supported by substantial evidence [citation].'"

The Court below also referred to the substantial administrative burden which would be placed upon housing authorities if a rigid requirement for a "full evidentiary hearing" were mandated.

Rejecting petitioner's attempt to rely on *Goldberg* v. *Kelly*, 397 U.S. 254, the Court of Appeals emphasized that *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

The Court held that it has long been settled that the procedural rights appropriate in the context of the holder of a status need not be appropriate or available to one who is denied the right in the first instance. Reference to the motor vehicle and other licensing laws was made. The Court also noted that this distinction pertains in the criminal law; for example, once a prisoner has been granted parole, he has a right to counsel at any subsequent revocation hearing, but one seeking parole in the first instance does not have a parallel right. *Menechino* v. *Oswald*, 430 F. 2d 403, 411; *Matter of Briguglio* v. *New York State Board of Parole*, 24 N.Y. 2d 21.

ARGUMENT

New York's procedure as to an applicant rejected for public housing, which provides specific notice and an opportunity to rebut the grounds for rejection with the aid of counsel, is in full accord with due process and presents no federal question for review by this Court.

Petitioner asserts that this Court should review the decision below because it concerns public housing, and must be viewed "in the context of the present housing crisis" (Pet., p. 5). However, his petition demonstrates no consti-

tutional defect in New York's procedure relating to rejected applicants for public housing.

Under § 156-a of the New York Public Housing Law, the applicant receives notice that he has been found ineligible and that he may be apprised of the reasons therefor at a personal interview at the office of the housing authority. During this subsequent interview, at which the law permits that counsel may be present,* the applicant may ask any questions which will help him to understand why he has been rejected. If he wishes to rebut the reasons presented to him, 9 New York Code of Rules and Regulations (hereinafter NYCRR), § 1627-7.3, provides for a housing authority Board of Review hearing, at which he may appear with counsel.

The nature of this hearing was recently made even more explicit in an amendment to § 1627-7.3, which provides:

> "The board shall also review appeals by applicants from any administrative ruling or finding of ineligibility for admission upon written demand of the applicant, made within thirty days after the interview granted in accordance with the provisions of section 156a of the Public Housing Law. The applicant at the time of such interview, shall be apprised of his right to a review by the board of review. Such review shall be in the form of an informal hearing at which the applicant may appear by counsel or any other qualified representative of his choice and present either orally or in writing, material relevant to said appeal."

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* The record in the Court below shows that respondent White Plains Housing Authority denied in its answer, petitioner's allegation that his attorneys were told by telephone that they could not be present at the interview with respondent's Executive Director. The regulation does not authorize any exclusion of counsel or other representative of an applicant.

In view of these requirements, petitioner's assertion that this case presents the issue of "adequate notice" (Pet., p. 5) is frivolous.* His remaining contention is that the Court below contravened applicable decisions of this Court by holding that an evidentiary hearing with witnesses is not required for rejected public housing applicants.

However, the applicable decisions of this Court have established that due process does not mandate the use of the same procedures in every context. As was held in *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U.S. 886, 894 (1961):

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

Due process in this context requires procedures which insure that the applicant fully comprehends the reasons for his rejection, and has an opportunity to rebut the charges with the aid of counsel. This is precisely what is accorded by New York law and regulation. Many other administrative determinations are made on this basis. As this Court stated in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), in respect to adverse action taken against an applicant for a broadcasting license:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open."

The informal hearing provided by public housing authorities in New York, is related to the practical necessity of processing numerous requests for housing accommoda-

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* Indeed, the Court below held that "the issue on this appeal, taken by our leave, is whether the Appellate Division was correct in rejecting Special Term's holding that petitioner was entitled to 'a full evidentiary hearing'. . . ." (A-6).

tions.* Such administrative considerations, while not decisive in determining the application of due process, are relevant as to the *form* which due process requires in a given case. *Cf. Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968); *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 465, 511 (1937); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971); *Hodgin* v. *Noland*, 435 F. 2d 859 (4th Cir. 1970); *Richardson* v. *Wright*, —— U.S. ——, 40 U.S.L.W. 4232 (1972).

Moreover, the distinction between tenants (who must receive a full adversarial hearing under New York law** prior to eviction) and rejected applicants is based not only on administrative considerations but also upon a difference in the legal nature of their interest. This distinction is supported by the other cases which differentiate a request for a new status from deprivation of a status already achieved. As the Second Circuit in *Menechino* v. *Oswald*, 430 F. 2d 403 (1970), recently held (in discussing and rejecting a claim that due process requires counsel at parole release hearings):

> "Nor is this the case where the state, in an adversary proceeding is seeking to deprive a person of liberty, property or a status *presently enjoyed*. See, e.g. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961) (expulsion from tax-supported college); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare payments); *In re Gault*, 387 U.S. 1 (1967) (adjudication as juvenile delinquent and commitment); *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment)." (Emphasis added.)

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* The New York City Housing Authority, for example, rejected at least 9,411 applications for public housing in 1970, receives approximately 90,000 applications annually, has an average backlog of 135,000 applications, and is able to provide admission to about 10,000 applicants.

** *Williams* v. *White Plains Housing Authority*, 62 Misc. 2d 613 (Sup. Ct., Westchester Co., 1970), aff'd 35 App. Div. 2d 965 (2d Dept. 1970).

Another example is the well-recognized difference between the procedural rights of a probationary employee in contrast to a permanent employee. The Court in *Tichon* v. *Harder*, 438 F. 2d 1396 (2d Cir. 1971) held in relation to a probationary caseworker employed by the Connecticut Department of Welfare:

> "... the (district) court stated that due process does not require a formal hearing and a right to appeal upon the discharge of a probationary employee, as opposed to a permanent employee. The former category of employees, having less or no reservoir of professional reputation built up through employment, possesses less of a claim to procedural rights, on the theory that interests other than continued employment at a particular job are not at stake."

In the case at bar, the Court below also made reference to licensing provisions as a further illustration:

> "To draw upon common examples, applicants for a motor vehicle license receive specific notice of their rejection (which is required as to housing applicants found ineligible pursuant to section 156-a of the Public Housing Law) but have no right to an administrative hearing on the issues (Vehicle and Traffic Law, § 501; *Matter of Nelson* v. *Kelly*, 4 A D 2d 596), such as that accorded a driver who has had his license revoked or suspended (Vehicle and Traffic Law, § 510; *Matter of English* v. *Tofany*, 32 A D 2d 878). Similarly, a liquor license cannot be canceled or revoked without a formal hearing; whereas a rejected applicant for such a license possesses no such right (9 NYCRR 52.13, 54.1 *et seq.*)."

Only one of the cases cited by petitioner herein involves an applicant for public housing whose procedural rights as to a determination of ineligibility were equated with those of tenants. See *Davis* v. *Toledo Metropolitan Housing Au-*

thority, 311 F. Supp. 795 (N.D. Ohio, 1970). The District Court gave no rationale whatever for its conclusion on this point, and it is not surprising that the Court below found it "unpersuasive" (A-9). *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968) and *Colon* v. *Tompkins Square Neighbors*, 294 F. Supp. 134 (S.D.N.Y. 1968), referred to in the petition at p. 7, relate neither to the rights of applicants *vis-a-vis* tenants, nor to the question of evidentiary hearings.

Indeed, any attempt to put the rights of public housing applicants and those of tenants on the same plane would be unrealistic. To be uprooted from the home and community where one is living, to endure the anxiety of being evicted and at the same time seeking new accommodations, is in no way comparable to an applicant's situation. The latter's dilemma may also be serious, but it is limited to the desire for a change in living quarters. It must also be pointed out that public housing is so scarce that a large percentage of applicants in most geographical areas cannot be accommodated, quite aside from the issue of undesirability.

Non-housing cases cited by petitioner all concerned plaintiffs deprived of their livelihood or sole source of income, without alternate means of practicing their professions or occupations. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)*; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Hornsby* v. *Allen*, 326 F. 2d 605, reh. den. 330 F. 2d 55 (2d Cir. 1964); *Barnett* v. *Lindsay*, 319 F. Supp. 610 (D. Utah, 1970). Moreover, many of the cases mentioned in petitioner's brief discussed an applicant's right to appropriate constitutional protections but did *not* mandate an evidentiary hearing for such applicants. See e.g. *Homer* v. *Richmond*, 292 F. 2d 719 (D.C.

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* As the Court below also pointed out (A-8), *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

Cir. 1961); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926).

It should be further noted that petitioner utterly fails to demonstrate that an evidentiary hearing would have been necessary in order to make an effective rebuttal in his own case. He was rejected because he had a criminal record (certified by the City Court of White Plains, New York) which included disorderly conduct and because he had failed to submit required records to the Housing Authority.*

Although these issues and charges center entirely around documents, petitioner claims to have been harmed because he was denied a trial-type hearing (which would involve the right to confront and cross-examine witnesses relied upon by the authority). The "witness" here has a police record, and although petitioner argues (p. 3) that one assault charge was withdrawn, he does not deny his convictions for disorderly conduct and arrests for assault. Any points in rebuttal, plus affidavits attesting petitioner's character, could have been introduced at the informal hearing provided by state regulation. No formal trial or verbatim transcript would have been necessary.

The indispensable core of procedural due process in finding facts is neither an expensive transcript nor expensive cross-examination, but is the relatively easy and inexpensive process of confronting the individual with the evidence against him and listening to what he has to say.

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* Petitioner is among many families competing for a tragically limited commodity. At present, there are 1,285 applications pending for approximately 545 apartments, with a turnover of only 15 apartments per year. Thus, the Housing Authority is entrusted under State law with the grave responsibility of selection and "proper screening" of prospective tenants. *Matter of Manigo* v. *N.Y.C. Housing Authority*, 51 Misc. 2d 829, 832 (Sup. Ct. N.Y. Co. 1966). It is in this context that petitioner's rejection because of his criminal record must be viewed. At the very least, it supported the Authority's determination to award the available apartments to applicants who do not have such a history.

In summary, there is no basis in the applicable decisions of this Court, nor in petitioner's Fourteenth Amendment claims, for the issuance of a writ of certiorari to review the judgment of the New York Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, April 10, 1972.

Respectfully submitted,

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